Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

L. Keith Yohn, D.D.S.,

Petitioner,

v.

Bernard A. Friedman, United States District Judge for the Eastern District of Michigan; Judith E. Levy, Esq., Law Clerk for the United States District Court for the Eastern District of Michigan, in Her or His Individual and Official Capacity, jointly and severally,

Respondents.

On Petition for a writ of Certiorari to the United States District Court for the Eastern District of Michigan Southern Division

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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1788

QUESTION PRESENTED

Whether the Federal District Court erred in dismissing Petitioner's action on the basis that a federal judge and law clerk, who wrote and signed an opinion and order granting a motion for summary judgment and dismissal before Petitioner had an opportunity to submit an affidavit with documentary evidence to the court and before a scheduled hearing for oral argument was had deprived Petitioner of a judicial proceeding to defend against the motion, are entitled to judicial immunity from personal damages liability and injunctive relief for actions violative of the Due Process of Law Clause under the Fifth Amendment to the Constitution of the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1,15
CONCISE STATEMENT RE JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. THE ELEMENTS OF DUE PROCESS OF LAW IN JUDICIAL PROCEEDINGS ARE: "A NOTICE," "A HEARING FOR ORAL ARGUMENT," and "PROOF."	4
A. AN AFFIDAVIT IS PROOF FOR THE PURPOSE OF A MOTION FOR SUMMARY JUDGMENT	7
II. THE UNDISPUTED FACTS IN THE RECORD ESTABLISH A *PRIMA FACIE* CASE FOR RESPONDENTS UNCONSTITUTIONAL ACTS	7
III. THE RESPONDENTS ARE NOT ENTITLED TO JUDICIAL IMMUNITY FOR THEIR UNCONSTITUTIONAL ACTS	10
REASONS FOR GRANTING THE PETITION	14
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388 (1971)	12
Celotex Corp. v Catrett, 477 US 317 (1986)	7
Communications Comm'n v WJR, 337 US 265 (1949)	4
Harlow v Fritzgerald, 457 US 800 (1982)	12
Kistner v Califano, 579 F2d 1004 (CA6 1978).	5
Larson v Domestic & Foreign Commerce Corp., 337 US 682 (1949)	11
Logan v Zimmerman Brush Co., 455 US 422 (1982)	5
Londoner v Denver, 210 US 373 (1908)	4
Southern Ohio Coal Company v Marshall, 464 FSupp 450 (S.D.Ohio E.D. 1978)	6
Summary Judgment Material, 147 FRD 647 (1993)	7
U. S. Constitution:	
Amendment V	2
Statutes:	
28 U.S.C. section 1254(1)	2
28 U.S.C. section 2101(e)	3

In The

Supreme Court of the United States

October Term, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States District Court for the Eastern District of Michigan Southern Division appears at Appendix A to the petition and is unpublished.

This petition is submitted before judgment in the U.S.Sixth Circuit Court of Appeals. The application for appeal appears at Appendix B to the petition.

CONCISE STATEMENT RE JURISDICTION

For cases from federal courts:

The date on which the United States District Court for the Eastern District of Michigan Southern Division decided my case was November 4, 1998. An appeal of right was made to the U.S. Sixth Circuit Court of Appeals on December 1, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) and 28 U.S.C. sec. 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

US CONST, AM V

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. section 1254. courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

STATEMENT OF THE CASE

This case involves the immunity of a federal judge and law clerk and the Due Process of Law rights of a citizen in judicial proceedings. Petitioner complains that during his lawsuit to recover property rights from the Regents of the University of Michigan, case No. 97-70041, Respondents Honorable Bernard A. Friedman and law clerk Judith E. Levy wrote and signed an opinion and order granting judgment and dismissal in favor of the Regents before Petitioner had a sufficient opportunity to submit an affidavit with documentary evidence to the court to show that a genuine issue of material fact existed for trial and before a scheduled hearing for oral argument was had and these acts deprived the Petitioner of a judicial proceeding to defend against the Regents' motion for summary judgment and dismissal.

Jurisdiction in the Federal District Court was pursuant to 28 U.S.C. section 1331 and 28 U.S.C. section 1367(a).

ARGUMENT

I. ARE THE ELEMENTS OF DUE PROCESS OF LAW IN JUDICIAL PROCEEDINGS " A NOTICE," " A HEARING FOR ORAL ARGUMENT" and " PROOF." ?

For almost a century this Court consistently held that the elements of due process of law in judicial proceedings are: "Due process of law... in strictly judicial proceedings... demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner v Denver,* 210 US 373, 386, 28 SC 708, 52 LE 1103 (1908). In *Communications Comm'n v WJR,* 337 US 265, 275, 69 SCt 1097, 93 LEd 1335 (1949), the Court continued to hold true to this principle,"Due process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, *Londoner v Denver,* 210 US 373, in others that argument submitted in writing is sufficient. *Morgan v United States,* 298 US 468, 481."

In a case involving a litigant's right to a judicial proceeding, the Court stated:

> "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In *Societe Internationale v Rogers,* 357 US 197 (1958), for example--where a plaintiff's claim had been dismissed for failure to comply with a trial court's order--the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Logan v Zimmerman Brush Co.,* 455 US 422, 429, 102 SCt 1148, 1154-55, 71 LEd2d 265 (1982).

Case law progeny from the Sixth Circuit sheds some light on the issue.

> "It is permissible in this circuit for a District Court to enter a summary judgment *sua sponte. Kistner v Califano,* 579 F2d 1004, 1006 (CA6 1978). However, the Court must still "afford the party against whom summary judgment will be entered advance notice as required by Rule 56 and an adequate opportunity to show why summary judgment should not be granted." *Kistner v Califano,* supra, at 1006. The rule thus provides for (1) the service by at least one party of a motion for summary judgment, and notice to all parties of the motion at least ten days prior to the hearing thereon, (2) optional service of affidavits

in opposition to the motion, (Rule 56(a) and (b) provide for the optional service by the moving party of affidavits in support of the motion), and (3) **a hearing.** *Kistner,* supra, p 1005 - 06. *Harrington v Vandalia-Butler Board of Education et al.,* 649 F2d 434 (CA6 1981); *Crobons v Wisconsin National Life Ins. Co.,* 790 F2d 475, 478 n. 1 (CA6 1986) (district court may enter summary judgment sua sponte so long as the party against whom judgment is entered is afforded a sufficient opportunity to defend). *Boger v Wayne County,* 950 F2d 316, 320 (CA6 1991)."

In *Southern Ohio Coal Company v Marshall, 464 FSupp 450, 455 (S.D. Ohio E.D. 1978),* the court explained:

"Due process protections are applicable to administrative procedures that adjudicate, as well as to the courts. And those protections include 'the right to support ... allegations by argument, however brief, and, if need be, by proof, however informal.' *Londoner v Denver,* 210 US 373, 386, 28 SC 708, 52 LE 1103 (1908). See also *Ohio Bell Telephone Co. v Public Utilities Comm'n.,* 301 US 292, 57 SCt 724, 81 LEd 1093 (1937). *United States v Florida East Coast R. Co.,* 410 US 224, 93 SCt 810, 35 LEd2d 223 (1973); *Bi-Metallic Investment Co. v State Board of Equalization,* 239 US 441, 36 SCt. 141, 60 LEd 372 (1915)."

A. Is An Affidavit Proof For The Purpose Of A Motion For Summary Judgment ?

Professor Edward Brunet put it this way.

"The text of Rule 56(e) makes clear that "supporting and opposing affidavits ... should set forth facts *as would be admissible as evidence."* Case law enforces this requirement rigorously." (Citations omitted). Summary Judgment Materials, 147 FRD 647 (1993).

Chief Justice Rehnquist wrote.

"Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate " specific facts showing that there is a genuine issue for trial." *Celotex Corp. v Catrett,* 477 US 317, 106 SCt 2548, 91 LEd2d 265 (1986).

Thus, there can be no doubt in the minds of this Court that the Due Process of Law Clause under the Fifth Amendment to the Constitution of the United States provides a citizen of this Country the Constitutional right in the Federal Courts to "A Notice," "A Hearing for Oral Argument," and "A Sufficient Opportunity to Submit Proof to the Court."

II. WHETHER THE UNDISPUTED FACTS IN THE RECORD ESTABLISH A *PRIMA FACIE* CASE FOR THE RESPONDENTS' UNCONSTITUTIONAL ACTS.

On January 6, 1997, Petitioner filed a complaint against the Regents of the University of Michigan (hereinafter, "the Regents") for recovery of property rights. (Docket entry sheet for case 97-70041, Petitioner's exhibit hereinafter "PX" 3 page 3).

Petitioner filed a motion for judgment on the pleadings on February 7, 1997. On February 18, 1997, the Respondents noticed a hearing before Judge Friedman and set April 9, 1997, for the hearing date. (PX 3 p 3). In this notice, Respondents advised the Regents that they had a 10 day window of opportunity to respond to Petitioner's motion and advised the Regents that the window of opportunity closed on March 4, 1997. The March 4 date was calculated from the date the parties were notified of the hearing. [February 18]. (PX 5).

On February 21, 1997, the Regents made a motion for summary judgment. On March 17, 1997, Judge Friedman scheduled a hearing on the Regents motion and set the hearing date for April 9, 1997. (PX 3 p 4). Respondents did not advise Petitioner of the date the 10 day window of opportunity for him to respond to the Regents' motion closed. Nonetheless, Petitioner believed that he had a window of opportunity to respond to the Regent's motion **equal** to the window of opportunity the Regents had to respond to his motion and believed his window closed on April 3, 1997. The April 3 date was calculated from the date the parties were notified of the hearing. [March 17].

On March 25, 1997, Petitioner served an affidavit with documentary evidence to Judge Friedman. The affidavit was received by Judge Friedman on March 28, 1997, well before April 3, 1997. (PX 3 page 5).

On or before March 25, 1997, Respondent Levy wrote an opinion and order granting the Regents' motion for summary judgment stating that "...plaintiff does not present an affidavit or any other evidence to refute defendants' claim...." (PX 1 page 3).

On March 25, 1997, Judge Friedman signed the opinion and order granting the Regents' motion, entered judgment for the Regents, dismissed the Petitioner's action, and canceled the April 9, 1997, hearing. (PX 1, PX 3 page 4 and PX 4).

Hence, the undisputed facts in the record establish a *prima facie* case showing the Respondents wrote and signed an opinion and order granting the Regents' motion for summary judgment and dismissal before Petitioner had a sufficient opportunity to submit proof to the court in the form of an affidavit with documentary evidence and canceled a hearing for oral argument.

Finally, there is no reason why Respondents could not have waited until the window of opportunity for Petitioner to submit proof to the court had closed before they wrote and signed an opinion and order for judgment and dismissal in favor of the Regents.

III. ARE THE RESPONDENTS ENTITLED TO JUDICIAL IMMUNITY FOR THEIR UNCONSTITUTIONAL ACTS ?

Generally judges and their clerks are entitled to absolute immunity. However, the framers of the U.S. Constitution knew only to well that powerful government officials can become tyrannical, greedy, self-serving, arrogant, authoritarian, amoral and corrupt. They formulated these constitutional principles to protect a citizen from such dangers. In situations of abuse, an action for damages against the responsible officials can be an important means of vindicating constitutional guarantees.

American jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. See, *United States v Lee,* 106 US 196,220, 1 SC 240, 27 LE 171 (1882); See also, *Marbury v Madison,* 1 Cranch 137 (1803); *Scheuer v Rhodes,* 416 US 232, 239-40, 94 SC 1683, 40 LEd 2d 90 (1974).

There are exceptions to the Doctrine of Immunity. According to *Larson v Domestic & Foreign Commerce Corp.,* 337 US 682, 69 SCt, 1457, 93 LEd 1628 (1949), suits that charge federal officials with unconstitutional acts are not barred by immunity. The *Larson* court explained that when a federal official commits an unconstitutional act, he is necessarily acting outside his official authority because the sovereign cannot command the official to commit an unconstitutional act. Federal officials have no immunity when: (1) the official's act is beyond the limits of his statutorily designated authority, (2) the official is acting pursuant to an unconstitutional statute, or (3) the official himself commits an unconstitutional act or deprives another of a constitutional right.

Case law progeny is compelling, suits that charge federal officials individually with unconstitutional acts are not barred by immunity. *Dugan v Rank,* 372 US 609, 621-11, 83 SCt 999, 1007, 10 LEd2d 15 (1963); *Malone v Bowdin,* 369 US 643, 647, 82 SCT 980,983, 8 LEd2d 168 (1962) See also, *Babcock & Wilcox Co. v Rumsfeld,* 70 FRD 595,599 (N.D. Ohio E.D. 1976); *Pena v Gardner,* 976 F2d 469,474 (CA9 1992); *U. S. v Yakima Tribal Ct.,* 806 F2d 853 (CA9 1986); *Church of Scientology Int'l v Kolts,* 846 FSupp 873 (C.D.Cal 1994); *Tashima v Administrative Office of U.S. Courts,* 719 FSupp 881 (C.D. 1989).

There is no substantial basis, by Congress, the U.S. Constitution or any other source, for holding that judicial officials generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a citizen's clearly established constitutional right.

The constitutional cause of action recognized in *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 91 SCt 1999, 29 LEd2d 619 (1971), would similarly be "drained of meaning" if federal officials were entitled to absolute immunity for their constitutional transgressions.

Furthermore, a judge in the Sixth Circuit is not shielded from suit where his conduct violates clearly established statutory or constitutional rights. See, *Harlow v Fitzgerald*, 457 US 800, 102 SCT 2727, 73 LEd2d 396 (1982). See also, *Ireland v Tunis*, 113 F3d 1435 (CA6 1997); *Tidik v Ritsema*, 938 FSupp 416 (E.D. Mich 1996); *Bridges v Senger*, 730 FSupp 1401 (W.D. Mich 1990).

In sum, Petitioner expected Judge Friedman to write and sign opinions and orders in his judicial capacity. But, Petitioner did not expect Judge Friedman to deprive him of an opportunity to submit proof to the court through an affidavit and/or oral argument and to render a decision without proof in the record to support his ruling.

Petitioner's complaint falls within two of the exceptions to the general rule protecting government officials from liability under the doctrine of immunity. Because the government has no power to confer on the Respondents, (1) the authority to act unconstitutionally and (2) deprive the Petitioner of a constitutional right. Petitioner's allegation that the Respondents violated his due process of law and deprived him of a constitutional right to a lawful judicial proceeding are unconstitutional acts beyond their authority and is a suit against the Respondents in their individual capacity. (First amended complaint paras 1, 2, 23, 24, 31, 33, 35, 37, and 40).

Therefore, Petitioner's suit for declaratory or injunctive relief, and money damages against the Respondents is grounded on alleged unconstitutional acts that are beyond individual Respondents' designated authority.

In light of the preceding discussed principles, if federal Respondents Friedman and Levy seek absolute immunity from individual liability for their unconstitutional conduct they must bear the burden of showing the Court how their unconstitutional acts enhance public policy which entitles them to any kind of immunity.

REASONS FOR GRANTING THE PETITION

I.

The Court needs to clarify the circumstance(s) under which a federal judge and law clerk are divested of their immunity.

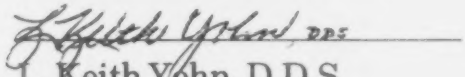
II.

This Court needs to determine if a citizen's constitutional rights are in danger when a federal judge and law clerk acting in their judicial capacities can with impunity deprive a citizen of an opportunity to submit proof to the court and a hearing for oral argument before granting a motion for summary judgment and dismissal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: January 12, 1999.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

L. Keith Yohn, D.D.S.,
Plaintiff,

No. 98-CV-73556-DT
Hon. George E. Woods

v

Bernard A. Friedman, United States District Judge for the Eastern District of Michigan; Judith E. Levy, Esq., Law Clerk for the United States District Court for the Eastern District of Michigan, in Her or His Individual and Official Capacity, jointly and servally,
Defendants.
_____/

ORDER OF DISMISSAL

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 4th day of November, 1998.
PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court upon Defendants' Motion to Dismiss;

The Court, having entered an Order dismissing Plaintiff's First Amended complaint on the ground of immunity; now, therefore,

IT IS HEREBY ORDERED that Plaintiff's First Amended Complaint against Defendants shall be, and hereby is, DISMISSED in its entirety.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

APPENDIX A

UNITED STATES DISTRICT COURT

For the Eastern District of Michigan

L. Keith Yohn, D.D.S.

Docket Number 98-CV-73556

Hon. George E. Woods

(District Court judge)

v

Hon. Bernard A. Friedman, U.S. District Judge,
Judith E. Levy, Esq. U. S. District Law Clerk.

NOTICE OF APPEAL

Notice is hereby given that L. Keith Yohn, D.D.S. appeals to the United States Court of Appeals for the Sixth Circuit from the judgment entered in this action on November 4, 1998.

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pro se
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Date December 01, 1998.

6CA-3

APPENDIX B